Supreme Court, U.S.
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No. 88-433

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TERRYDALE LIQUIDATING TRUST,

Petitioner,

-v-

HERBERT BARNESS, JOHN F. BISHOP, EDGAR H. CHAPPELL, CHARLES W. CORBITT, GEORGE S. MANN, BROOKS WALKER, JR., LOUIS W. WALKER, and CHARLES M. WILLIAMS, individually and as Trustees of, and DAVID B. BRYANT as Trustee of, SAN FRANCISCO REAL ESTATE INVESTORS, and KEITH L. BROWN, individually, and as SAN FRANCISCO REAL ESTATE INVESTORS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I. The Judgment Should Be Set Aside Because Of Respondent's Secret Tampering With Petitioner's Critical Witnesses.

In its unpersuasive attempt to defend the secret agreement to pay $50,000 for the attorneys' fees of its adversary's critical witnesses, respondent fails to address the main point of the petition: the judgment should be set aside for fraud on the court because of the nondisclosure of the agreements (negotiated by respondent and its attorneys), which affected the credibility of key witnesses whose testimony formed an integral part of the trial judgment. *Hazel Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1943). Respondent agrees that *Hazel-Atlas* requires a judgment to be set aside where there has been a fraud on the court. (RB 18-19)[1] Rather than address the question of law whether its admitted conduct constitutes a fraud on the court, respondent unsuccessfully argues the legality of the agreements. While the petition does not hinge on a violation of 18 U.S.C. §201 or the Code of Professional Responsibility, respondent's outrageous contention that its conduct is "expressly permitted by law" (RB 13) points up the need for intervention by this Court. Petitioner has shown that such conduct is clearly prohibited as a fraud on the court and is so repugnant to the litigation process that the tainted judgment must be set aside. *Hazel-Atlas Glass Co., supra.*

Most recently, this Court has emphatically shown its concern for protecting the integrity of the judicial process. Just last term, in *Liljeberg* v. *Health Services Acquisition Corp.*, 100 L.Ed.2d 855 (1988), this Court ordered a new trial under Fed. R. Civ. P. 60(b) because the district court's impartiality might reasonably have been questioned. The Court reminded that "to perform its high function in the best way 'justice must satisfy the appearance of justice,' "100 L.Ed. 2d at 875, quoting *In re Murchison*, 349 U.S. 133, 136 (citation omitted).

Liljeberg also reaffirms the well-established rule that agreements and interests which affect the partiality of the factfinder as

[1] "RB refers to Respondent's Brief in Opposition. "Pet." refers to the Petition. References to the separately bound appendix are indicated by page number, followed by "a."

well as the credibility of the witnesses must be disclosed and subject to scrutiny by the other parties to the litigation. *See also Giglio* v. *United States*, 405 U.S. 150 (1972) (new trial mandated because of nondisclosure of immunity agreement between key witness and prosecution).

Respondent concedes that "when a fraud . . . has in fact occurred during the trial, the courts have an obligation to reexamine and, if warranted, set aside the verdict or decision" relying on, *inter alia*, *Hazel-Atlas*. (RB19). Thus, respondent's only challenge raises a question of law whether its undisputed conduct constitutes fraud requiring that the judgment be vacated and that there be a "complete denial of relief" to the respondent. *Hazel Atlas*, 322 U.S. at 250. Respondent does not, because it cannot, challenge petitioner's showing that the district court relied heavily on the tainted testimony of the former TRT trustees. (Pet. 10-11). Thus, here, as in *Hazel-Atlas*, the lower court's own opinion demonstrates the materiality of the tainted evidence.

Respondent's argument that the outcome would have been the same, notwithstanding the witness tampering (1) is not true, (2) is not the issue, and (3) ignores the need for a hearing to reach that conclusion. First, in arguing that the case could be resolved based on market valuation, SFREI ignores petitioner's claims for breach of Declaration of Trust, which related to whether the non-Gramlich trustees were controlled and dominated by the Gramlich trustees and therefore depended on the testimony of those witnesses. Whether TRT had the power to sell and liquidate the trust and whether TRT's actions were *ultra vires* did not depend on the expert testimony or the marketplace.

Second, the district court ignored the standard of *Hazel-Atlas*, which demands that the courts protect the integrity of the judicial process regardless of the outcome, as it erroneously focused on whether the result would have been different, had it known of the agreement.

Third, in denying TLT's request for discovery on the content of the agreements between SFREI and the witnesses' lawyers, the district court decided the motion for a new trial based on the one-sided submission of the lawyers who negotiated those agreements

and kept them secret from the court and petitioner. The court disregarded (i) the reality that the independence of the witnesses and their counsel was destroyed by the agreements, (ii) the likelihood that the payments were contingent, (iii) the undisclosed communications between counsel for SFREI and counsel for the witnesses, and (iv) the possibility that the witnesses perjured themselves.

Phillips v. *Crown Central Petroleum Corp.*, 556 F.2d 702 (4th Cir. 1977), *cert. denied*, 444 U.S. 1074 (1980), highlights the district court's error in denying petitioner's requested discovery. In *Crown Central*, the Fourth Circuit vacated the injunction where the district court, without inquiring into the extent of the perjury, held that it would continue to credit the tainted testimony. The Fourth Circuit recognized that the district court "already" had a "substantial basis" apart from the perjured testimony to support its injunction and even may have "correctly estimated the situation." Nonetheless, the court admonished that "that is not a sufficient reason for not conducting a plenary hearing."

> Just how pervasive was that perjury, neither the judges nor the parties . . . can know. It is possible that larger parts of the intricate web of findings may be affected. . . . One must hear before one decides. *Audi alteram partem* is a fundamental rule of procedural fairness.

Id. at 705. In this case, as in *Crown Central*, the district court committed reversible error in denying the motion for discovery and new trial, thus preventing the exploration of the extent of the fraud and tampering.

An oral agreement through attorneys, who are officers of the court, to pay $50,000 in attorneys' fees for witnesses called by an adversary — which agreement is not disclosed to the court or the adversary — clearly amounts to tampering with witnesses. Respondent's argument to the contrary is a meritless distraction and its supposed authorities lend it no support whatsoever. Because

respondent has argued the Criminal Code and the Professional Code, petitioner responds accordingly.[2]

Simply stated, 18 U.S.C. Sec. 201(c) (2) *expressly* prohibits (i) "directly or indirectly" giving or promising, (ii) "anything of value" to any person, (iii) "for or because of the testimony." The payments admitted to by SFREI fit squarely within that language. The three elements of 18 U.S.C. Sec. 201(c) (2) are all satisfied: (1) direct or indirect promise or giving — satisfied here by the pretrial agreements and subsequent payments; (2) of something of value - here $50,000 in attorneys' fees; and (3) for or because of the testimony - here for the lawyers who prepared the witnesses for their trial testimony. [3]

Respondent erroneously asserts that there was no connection between the testimony and the payments under 18 U.S.C. 201 (c) (2) (RB 14). The connection is abundantly clear: the payments were to the attorneys who prepared the witnesses for their trial testimony. Beyond dispute, those attorneys were aware of who was paying their fees. Further, SFREI assumed that the witnesses were similarly aware of the agreement as is shown by the state-

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[2] TLT forcefully maintains that SFREI has violated the federal antibribery statute, 18 U.S.C. Sec.201, and the Code of Professional Responsibility. (Pet. 9). That TLT has not asserted such as independent grounds for the petition does not diminish that fact. Respondent's astonishing assertation that "[t]here is no statute, case or ethical rule that proscribes the payment of the legal fees and expenses of counsel for a witness," (RB 14) ignores the explicit language of 18 U.S.C. Sec. 201 and the natural reading of the Code of Professional Responsibility.

[3] Courts have repeatedly given the "for or because of" language of Sec. 201(c) a broad reading. *United States* v. *Evans*, 572 F.2d 455, 480 (5th Cir. 1978) *cert. denied*, 439 U.S. 870 (1978). The purpose of Sec. 201(c) is to reach any situation in which payments or gifts might cloud the judgment of the recipient. *Id.* Hence, 18 U.S.C. Sec. 201 (c) (2) proscribes the giving or offering of all gratuities. All that is required is the intent to make or offer the gift; there need be no showing that the gift was given with intent to influence conduct corruptly. *United States* v. *Irwin*, 354 F.2d 192, 196-197 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966) ; *United States* v. *Jackowe*, 651 F. Supp. 1035 (S.D.N.Y. 1987) . (1986 recodification of 18 U.S.C. Sec. 201 redesignated former 18 U.S.C. Sec. 201(f) and (h) as subsections (c) (1) (A) and (c) (2) respectively).

ment of its attorney, Mr. Kraus, that he was surprised by the witnesses' testimony. ("When I sat there and heard the witnesses say that they didn't know about the agreement that was the first time that I knew that they didn't know . . . "(216a)). Respondent cannot now disavow the relationship it created.

The case law repeatedly states that payments to witnesses (other than experts), especially an adversary's, are repugnant to the integrity of the judicial process. *E.g. In re Robinson*, 151 A.D. 589, 136 N.Y.S. 548, 555-57 (1912), *aff 'd*, 209 N.Y. 354 (1913) cited by the Model Code of Professional Responsibility, E.C. 7-28 n. 48. (*See also* Pet. 9)[4]

With regard to ethical violations, respondent recognizes that DR 7-109 (C) clearly proscribes any agreement which is contingent on the content of the testimony or the outcome of the litigation; but the presence or absence of a contingency has never been explored.[5] Further , while DR 7-109 (C) permits reimbursement for expenses, it does not permit reimbursement for attorneys' fees. "Expenses" is a term of art clearly understood as distinct from attorneys' fees. *See* 28 U.S.C. Sec. 1821; 28 U.S.C. Sec. 1927 (treating attorneys' fees as separate from expenses.)

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[4] SFREI's attempt to distinguish *Alexander* v. *Watson*, 128 F.2d 627 (4th Cir. 1942) on the ground that the secret agreement and payment here was "payment for the lawyers' actual time charges and expenses, *not* compensation for the witnesses' testimony" (RB 19, n. 12, original emphasis) ignores the reality that discharging the witnesses of $50,000 in attorneys' fees is plainly compensation to the witnesses.

[5] On the one hand, if the witnesses did not know who was paying their attorneys' fees, DR 5-107 was apparently violated. Messrs. Welte and Umin were required to discuss the agreements with and obtain the approval of their clients before accepting payment from a third party. On the other hand, if the lawyers did disclose, then the witnesses were lying when they said they did not know who was paying their fees. Alternatively, if the agreements were disclosed to the witnesses but were contingent (on the testimony or the outcome of the litigation), then DR 5-107 was not violated, but DR 7-109 (C) was clearly violated! In any event, the analysis magnifies the need for a hearing to untangle this web. *Phillips* v. *Crown Central, supra.*

SFREI's authorities are a sham. Surely, respondent is not suggesting that the Federal Criminal Code could be undermined by an ethics commission opinion from the Alabama Bar or an informal staff opinion from the Florida Bar. They are not relevant authority in this Court, particularly, on a petition which does not seek review of the Code of Professional Responsibility .[6] Moreover, the opinions are factually inapposite as they concern payments by a party who expected to call these witnesses as his own and patently do not authorize the *secret* payment of $50,000 in attorneys' fees for an *adversary's* witnesses.

SFREI's reliance on the Alabama opinion written in response to a telephone inquiry proves its desperation. The discussion of the payment of $3,000 to the attorney for an out of state non-party witness to appear at a deposition is written with absolutely no awareness of 18 U.S.C. Sec. 201; the proffered payment would clearly be unlawful under 18 U.S.C. Sec. 201 (c) (2). Moreover, the opinion explicity notes that if the secret payment were revealed, "the credibility of this witness would be virtually destroyed."

Respondent recasts its duty to disclose the fee agreement as petitioner's obligation to discover it (RB 10-11). That position is without any merit, particularly where respondent's counsel successfully objected to the inquiry that could have revealed the illegal agreements. [7]

Respondent further misrepresents claiming that the charge of witness tampering was "raised for the first time long after the

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[6] Both opinions are reproduced at the end of this brief for the court's convenience.

[7] When trustee Murphy testified that "one of the attorneys" told him that his attorneys' fees were going to be paid, SFREI's attorney, Kraus, successfully invoked the attorney-client privilege on behalf of the witness and his attorney to prevent TLT from discovering *which attorney* told Murphy that his attorneys' fees were going to be paid (149a). After its successful objection, SFREI is in no position to assert now that TLT was delinquent in not calling the attorneys to the stand.

petitioner was aware of the matters" (RB, Questions Presented p. (i)). In fact, TLT twice raised the issue as early as possible.[8]

SFREI's contention that the integrity of Messrs. Umin and Welte is established because "both of them swore in their affidavits that they acted completely independently" (RB 16) is nonsense. First, the agreements objectively destroyed their independence; second, these self-serving assertions have never been tested or explored under cross-examination, and thus are entitled to no weight.

SFREI misconceives the petition as a fact-finding mission (RB 17). The relevant facts regarding the tampering with witnesses are undisputed and admitted by SFREI and the lawyers for the witnesses. The question is one of law: what consequences should attach to the unquestioned wrongdoing? The courts below held that none was appropriate. The administration of justice requires this Court to review that legal conclusion.

II. The Award Of $1.5 Million In Attorneys' Fees To Respondent Should Be Stricken

SFREI should not be permitted to be reimbursed $1.5 million for its attorneys' fees incurred while SFREI and its attorneys (1) engaged in *repeated and willful deceptions* of petitioner and the district court regarding its conduct in New York and (2) secretly tampered with TLT's critical witnesses. SFREI attempts to distort TLT's position by arguing that the mere assertion of SFREI's defense—which was found by the district court to be "entirely devoid of merit"—does not require setting aside the attorneys' fee award. Petitioner is not claiming that it is the mere assertion of

[8] Right after trial, in opposition to SFREI's motion for contractual attorneys' fees, TLT asked for discovery based on its suspicion that SFREI paid the witnesses' attorneys' fees. The district court denied TLT's request for discovery without determining whether SFREI had agreed to pay the attorneys' fees. *Terrydale Liquidating Trust* v. *Barness*, 645 F. Supp. 920, 925 (S.D.N.Y. 1986). Then, in opposition to SFREI's supplemental application for attorneys' fees, still suspecting that SFREI tampered with its witnesses, TLT again requested discovery on this issue by a formal motion. In response, the attorneys for SFREI and the witnesses, for the first time, disclosed the agreements and payments (145a-148a, 158a-159a, 160a-162a) (See Pet. 6).

the defense; it is the *repeated* filing of false affidavits, motions and briefs which misrepresented and omitted the facts establishing personal jurisdiction, *in addition* to the witness tampering, which justifies such relief. Significantly, SFREI does not refute—as it cannot—any of the *facts* establishing SFREI's repeated misrepresentations. Thus, whether these undisputed facts establish misrepresentation and deception is a question of law, which should now be reviewed by this Court.[9]

Contrary to SFREI's assertions, the court and petitioner obviously were deceived by SFREI as proven by the fact that SFREI was successful on two motions to dismiss and in opposing one motion to reargue on the ground of lack of personal jurisdiction (Pet.3). The court's prior opinion demonstrates that the deception practiced by respondent and its attorneys had effectively misled the court to an erroneous legal conclusion.[10]

In sum, there is nothing "fictitious" about the undisputed fact that SFREI and its attorneys secretly agreed to pay and paid $50,000 in attorneys' fees for TLT's critical witnesses. Nor is there anything fictitious about the undisputed facts of SFREI's misrep-

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[9] Given that the District Court ultimately found SFREI's jurisdictional defense to be "entirely devoid of merit," SFREI's note (RB 18 n.11) attempting to challenge jurisdiction is disingenuous. Similarly, a frivolous defense cannot be asserted merely "to preserve the defense for appeal." RB 18 n.11.

Further, this Petition is not rearguing the District Court's "conclusive factual determinations" because the District Court made no factual determinations regarding SFREI'S deceptive conduct. The only finding the court made was that SFREI's defense was "entirely devoid of merit."

[10] The court was specifically misled by SFREI and its attorneys' deliberate refusal to inform the court that *Skadden executed documents in New York*, on behalf of SFREI, in connection with converting Lincoln Tower Building Co.'s right of first refusal into an option. *Bolton* v. *Gramlich*, 540 F. Supp. 822, 845 n.38. (S.D.N.Y. 1982). At that time, the court granted SFREI's motion to dismiss on the basis that plaintiff's claim that "SFREI must have had some involvement in the Lincoln-Terrydale modification of the right of first refusal" was "speculation." The *fact* was that Skadden on behalf of SFREI executed documents in New York in connection with the Lincoln-Terrydale modification, which was essential for the transaction's consummation.

resentations regarding its New York contacts. The admitted facts establish an undeniable fraud warranting an order vacating the judgment and striking the award of attorneys' fees.[11]

CONCLUSION

For reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 19, 1988

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[11] The Second Circuit's erroneous conclusion that the claims were "without any merit whatsoever" does no more than explain why petitioner seeks review by this Court. Repetition of the quote five times in respondent's brief does not aid its attempt to prejudice the petition. Similarly, every appeal and petition is motivated by a "desire to escape from the judgment" below (RB 3). Respondent gains nothing in its petty attempts to belittle the petition.

The Florida Bar

July 28, 1982

JOHN F. HARKNESS, JR
Executive Director

TALLAHASSEE, FL 32301-8226
904/222-5288

Staff Opinion TEO83026

Dear

I am responding to your request for an ethics opinion. Staff counsel are authorized by the Board of Governors of The Florida Bar to issue opinions which are advisory in nature. Should you disagree with my opinion, you may request an advisory ethics opinion from the Professional Ethics Committee by writing to the committee in care of this office. Requests for a committee opinion must be accompanied by either a brief or a memorandum with citations to authorities. Committee opinions are not usually rendered in less than four months.

In your letter of July 15th, 1982, you present the following situation. You recently represented a defendant in a personal injury matter which was settled. Soon thereafter, you were contacted by the roommate of the plaintiff (R) who voluntarily admitted to you that she had falsely answered certain questions on her deposition concerning the damages issue.

R has since obtained legal representation and is willing to testify as to the falsity of her earlier deposition and other related matters if she is given immunity from prosecution. R's attorney has indicated to you that, in his opinion, his attorneys' fees would be payable as part of his client's "expenses reasonably incurred" within DR 7-109(C).

Specifically, you request an opinion concerning the following questions:

a. Whether payment by your client of the witness's attorneys' fees in obtaining immunity is ethically permissible under DR 7-109(C), and Canon 9.

b. Whether you presently have a duty to contact the court under DR 7-102(B)(2), where you have yet to "clearly establish" by independent investigation that a fraud was perpetrated upon the court.

c. Whether you have an ethical duty to contact the State Attorney's Office in light of an admission by a witness that she committed felonious perjury.

In response to the first question, although research has revealed nothing directly on point, it appears to be permissible under the Code for your client to pay the witness's attorneys' fees related to her obtaining immunity from prosecution. DR 7-109(C) states that a lawyer may advance, guarantee, or acquiesce in the payment of: "(1) expenses reasonably incurred by a witness in attending or testifying." It is likely that R will not testify unless she is given immunity from prosecution. Therefore, the attorneys' fees associated with R's attempt to obtain immunity, a prerequisite to her testifying, are expenses "reasonably incurred" within the meaning of DR 7-109(C).

Your second question is resolved by reference to Advisory Opinion 75-19 and Proposed Advisory Opinion 82-3 (copies enclosed). Although these opinions concern an attorney's duty to reveal a fraud perpetrated by a client [DR 7-102(B)(2)] the reasoning followed by the Professional Ethics Committee is applicable to situations involving non-clients as well [DR 7-102(B)(2)].

In 82-3, the committee noted that under DR 7-102(B) the test or standard is that the information possessed must "clearly establish" fraud on the tribunal. "The committee is not a fact-finding body" the opinion stated, "nor is it able to glean from limited correspondence, and then weigh, all the substantive factors and factual considerations which would enter into the determination of whether fraud is clearly established. The responsibility for this factual determination must remain with the inquiring lawyer."

Advisory Opinion 75-19 concerned a client who had expressly confirmed to the attorney that he (the client) knew the true facts and had deliberately lied under oath. Thus, the committee concluded, the attorney possessed more than adequate information "clearly establishing" the client's fraud on the tribunal during the lawyer's representation and disclosure was required.

Under the circumstances described in your letter, it appears that you have received information "clearly establishing" that R. has perpetrated a fraud upon a tribunal and have a duty to reveal the fraud to the tribunal.

Your third inquiry relates to your duty to inform the State Attorney's Office of R's admission that she committed felonious perjury. The Code of Professional Responsibility does not mention the existence of such a duty. Should you conclude that you are obligated under DR 7-102 to inform the court that a fraud was perpetrated against it, in doing so you are meeting the disclosure requirements of the Code. Any criminal action to be pursued beyond that point is at the discretion of the court.

[Alabama]

ETHICS OPINION
RO-82-699

QUESTION:

"Pursuant to your request by telephone this date, I am requesting an opinion of the Disciplinary Commission concerning a proposed action on my part. Of course, I know this matter will be treated confidentially.

I am defending a lawsuit in Federal District Court in which my client may be liable for several million dollars. A most important part of our defense is the sexual impropriety on the part of the plaintiff toward several individuals. Because the nature of this subject, several individuals who were involved with the plaintiff now deny any such involvement.

I have talked at length with a lady who was involved with the plaintiff and in a manner most damaging to the plaintiff. This witness lives in a northern state. I have her telephone number but do not know her home address. She is planning to be married right after the first of the year but I do not know the name of her fiancee and will not, in all probability, be able to find her after the first of the year. It was by a fortuitous circumstance that I obtained her telephone number initially.

This witness expresses great hesitation about testifying to the truth concerning her relationship with the plaintiff. Because she was married when the relationship took place, because of the strain on her relationship with her present fiancee, because of the likelihood of her family finding out of her previous involvement with the plaintiff in that circumstance, because of what she claims to be mental anguish at having to so testify, and because of legitimate out-of-pocket expenses and loss of wages, her attorney has demanded a fee for her deposition testimony. I have fully disposed this to my client and the client has approved the payment of the fee. I would anticipate that the fee be paid to her attorney as an attorney fee and that he and the witness make whatever arrangement they wish to make. The probable amount of the fee will be approximately $3,000.00.

I have discussed this situation with a local Circuit Judge and he sees nothing ethically wrong with the payment and suggested that it be made to her attorney. I have also discussed this with the Chairman of the local Grievance Committee and he sees nothing ethically prohibitive in my complying with the demand of the witness' attorney.

I do want to emphasize that the witness will only be testifying to what actually happened. This is not a payment to influence her testimony or change it in any manner. Also, as I advised you by telephone, this testimony is *crucial* to my case and would go a long way toward a favorable result for my client. Also, I have tried for almost seven months to get testimony and, due to its nature, I have not been able to and will not be able to obtain it. I am caught in a very severe time bind as far as taking this deposition and I would appreciate your and the committee's response at your earliest convenience. Thank you very much for your courtesy to me

in this situation. If I can provide you with any additional information, I would be happy to do so."

ANSWER:

There would be no ethical impropriety in your permitting your client to pay the approximately $3,000.00 "attorney's fee" to the attorney of the out-of-state witness whose deposition you propose to take if you do not know and do not have any reason to believe that the "content of his(her) testimony" is contingent upon the payment of the fee and retention of the fee is in no way contingent upon the outcome of the lawsuit which you are defending, and if you obtain from the out-of-state deponent and/or her attorney an affidavit setting out her actual expenses in the nature of travel expenses, loss of wages, etc. and also setting forth the amount claimed by her attorneys as attorney's fees and the nature of the attorney's services rendered such as consultation, attending the deposition, etc.

DISCUSSION:

Ethical Consideration 7-28 provides:

"Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a nonexpert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a continent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associate conform to these standings."

Disciplinary Rule 7-109(C) provides:

* * *

"A lawyer shall not pay, offer to pay, or aquiesce in the payment of compensation to a witness contingent upon (1) the content of his testimony or (2) the outcome of the case." (emphasis and parenthesis added)

Disciplinary Rule 7-109(C), Code of Professional Responsibility of the American Bar Association provides:

• • •

"A lawyer shall not pay, offer to pay, or aquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for his loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness."

Former Canon 39, Canons of Professional Ethics of the American Bar Association, contained no reference to payment of witness fees. In Informal Opinion 847 (1965) however, the Committee on Ethics and Professional Responsibility of the American Bar Association held that it was not unethical to pay a witness for lost wages or actual out-of-pocket expenses, so long as the line was drawn between mere reimbursement and payment for testimony itself. Current DR 7-109(C), Code of Professional Responsibility of the American Bar Association, now codifies this principle.

Although DR 7-109(C) does not spell out the permissible payments to a witness as does the corresponding DR or the Code of Professional Responsibility of the American Bar Association, in Ethics Opinion 81-549 the office of General Counsel and the Disciplinary Commission approved of those payments as detailed in DR 7-109(C), Code of Professional Responsibility of the American Bar Association.

As your request for opinion indicates the witness could be entitled to certain legitimate out-of-pocket expenses. Furthermore, a nonparty witness whose deposition has been noticed is entitled to the services of an attorney for consultation and for attendance at the taking of the deposition to protect the deponent's

rights. See Informal Opinion 828, Committee on Ethics and Professional Responsibility of the American Association.

It somewhat taxes our credulity to believe that the entire $3,000.00, or a major portion thereof, will be allocated by the witness and her attorney to attorney's fees. However, absent knowledge on your part or reasonable cause to believe that a portion of the sum will be paid to the deponent to influence the content of her testimony and since the payment is in no way contingent upon the outcome of the case you are defending, we can see no ethical impropriety in your permitting your client to pay the sum to the out-of-state attorney.

We have Shepardized Disciplinary Rule 7-109(C) and can find no opinions of courts or committees that are helpful in resolving the problem that you pose. We hasten to state that we are somewhat skeptical of the actions of the out-of-state attorney but this is a matter for investigation and action by the appropriate disciplinary committees of his state bar. In summary, based upon the limited facts which are available to you and are available to us, we conclude that we can find no provision of the Code of Professional Responsibility that would preclude the payment that you purpose.

Of course, if it comes to your knowledge that a portion of the sum paid to the out-of-state attorney will be paid to the witness in order to influence the content of her testimony you would not only be guilty of violating DR 7-109(C) but also DR 1-102(A)(2) which provides:

"A lawyer shall not:

* * *

(2) Circumvent a Disciplinary Rule through the actions of another."

There are certain inherent dangers in the course which you propose to pursue. For example, if counsel for the plaintiff in the suit that you are defending should learn of the payment of the attorney's fees to the deponent's attorney and could further establish that a portion of this sum went to the witness which was in excess of her out-of-pocket expenses, the credibility of this witness could be virtually destroyed.

As hereinabove noted in the answer, we feel that you should obtain from the witness and/or her attorney an affidavit delineating the out-of-pocket expenses incurred or to be incurred by the witness and the basis and amount of the witnesses attorney's fee.